Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges	)	WC Docket No. 02-361

WORLDCOM'S RESPONSE TO AT&T'S PETITION FOR A DECLARATORY RULING THAT PHONE-TO-PHONE IP TELEPHONY SERVICES ARE EXEMPT FROM ACCESS CHARGES

WorldCom, Inc. ("WorldCom"), through counsel, hereby responds to AT&T Corp.'s ("AT&T") petition for a declaratory ruling that its phone-to-phone IP telephony services are exempt from access charges.

INTRODUCTION AND SUMMARY

We agree with AT&T that it is established Commission policy to decline to subject the transmission of voice communications over the public Internet or private IP networks (commonly referred to as "VOIP") to access charges, and that the ILECs' conduct, as reported in AT&T's petition, clearly violates that policy. The FCC should declare that its policy remains in place, and that ILEC efforts at "self-help" are in violation of that policy.

We also agree with AT&T that the Commission ought to make that policy permanent. The growth of VOIP services, and the unfortunate but predictable response of the ILECs to block that growth, should lead the Commission promptly to establish a rational intercarrier

compensation policy by resolving the policy questions raised both in this petition and in the Intercarrier Compensation NPRM, CC Docket No. 01-92. At the same time, the regulatory issues raised by the growth of Internet telephony ought also to inform the Commission's resolution of policy issues raised both in the pending *Broadband Framework* proceeding, CC Docket No. 02-33, and to a lesser extent in the *Triennial Review* proceeding, CC Docket No. 01-338. In particular, consideration of the policy issues raised in AT&T's instant petition should lead the Commission to determine that the tentative conclusions proposed in the *Broadband Framework* proceeding, if adopted, would undermine Commission efforts to adopt a rational broadband and Internet policy.

ARGUMENT

1. The FCC's Current Policy Does Not Allow the ILECs to Assess Access Charges on Internet Traffic, Regardless of the Applications Traveling Over the Internet.

AT&T is correct that it has been Commission policy for almost twenty years that enhanced services providers, including ISPs, are not required to pay carrier access charges. *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) ¶¶ 76-77; *In re Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 887-215, 3 F.C.C.R. 2631 (1988) ¶ 2. While AT&T follows the Commission in referring recently to this policy as creating an "exemption" for ESPs, it is more accurate to say that the Commission has always classified ESPs as end users of telecommunications services, and that the carrier access charge regime has been applied to carriers purchasing exchange access services, and not to end users.

This rationale behind the FCC's access charge treatment of ESP's is fully elaborated in the Commission's *Computer Inquiry* rules, *see, e.g., In re Amendment of Section 64.702 of the Commission's Rules and Regulations ("A Second Computer Inquiry")*, 77 F.C.C.2d 384, ¶ 96 (1980), *on recon*., 84 F.C.C.2d 50 (1980), *further recon*., 88 F.C.C.2d 512, *aff'd sub nom*. *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982). In these decisions, the FCC drew a distinction between basic transmission services, which it subjected to Title II common carriage regulation, and information services that ride on those basic services, which it left essentially unregulated. Under this dichotomy, ISPs are *providers* of information services, and *users* of telecommunications services; thus, the ILECs' assertions that ISPs should nonetheless be subject to carrier access charges is deeply inconsistent with the Commission's *Computer Inquiry* regime.

To a significant extent, the 1996 Act incorporated the policies and rules adopted in the *Computer Inquiry* regime into the FCC's basic governing statute. Thus the Act defined "exchange access" as the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). And it defined "information service" as a capability that is offered "via telecommunications." *Id.* § 153(20). As the Commission already has found, pursuant to these definitions ISPs do not originate telephone toll services, and thus do not provide exchange access services. Instead, they provide information services over facilities provided by ILECs and other carriers that in turn provide exchange access services to the ISPs.

The Commission properly credits its policy of excluding ISPs from excessive per-minute carrier access charges with aiding in the rapid growth of the online world, and eventually the

Internet itself, *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 344 (1997) ("Access Charge Reform Order"). The Commission also has explicitly found that the end user status of information services extends to all forms of Internet telephony services, including so-called "phone-to-phone" services it has tentatively characterized as "telecommunications services." *Universal Service Report to Congress*, 13 FCC Rcd. 11,501, ¶ 91 (1998) ("Report to Congress") (noting that question whether to subject phone-to-phone IP telephony services to access charge regime is a "difficult and contested issue" to be faced in the future). *See also id.* at 11,623 (Powell, Commissioner, concurring) (distinctions between voice and data are "difficult if not impossible to maintain" and a decision to impose traditional regulation on "innovative new IP services" could "stifle innovation and competition in direct contravention of the Act").

Notwithstanding this unequivocal policy, AT&T asserts that Verizon and Sprint are refusing to terminate AT&T's VOIP traffic over local business lines, or over reciprocal compensation trunks provided by CLECs. Apparently, these ILECs have taken the position that this kind of Internet traffic is "really" interexchange voice traffic that in their view should be subject to access charges. While this is the same position the ILECs have consistently urged over the last 20 years for all varieties of online and Internet traffic, the Commission has consistently rejected it. Instead, the FCC has concluded that it is sound policy to allow this nascent, innovative form of communications to develop without having to bear the burden of participating in an inefficient and non-cost based access charge regime. Any other rule, if applied to VOIP offerings using the public Internet, would be tantamount to a tax on the Internet, which the Commission has steadfastly opposed. While the Commission has intimated that its rules in this area might be temporary, that status does not mean the ILECs are free simply to engage in self-

help and violate them at will. At the least, the Commission should respond to AT&T's petition by making clear to the LECs that it intends its rules to be followed unless and until they are changed.

Moreover, while AT&T has decided to pay originating access charges in its particular IP telephony offering, and while its offering uses the public Internet, the Commission should also make clear that this only represents AT&T's choice. In fact, standing FCC policy is that IP telephony should be free of *all* interstate and intrastate access charges, including both originating and terminating access, and without regard to whether the services use the public Internet or a carrier's own facilities. Failure to make these points expressly will lead the ILECs to claim improperly that the Commission is drawing distinctions that reflect only AT&T's particular service offering, and not Commission policy. And the Commission's policy, clearly stated in the *Report to Congress*, is that all VOIP offerings are currently exempt from all access charges.

Finally, WorldCom agrees with AT&T that failure to take action to stop this ILEC self-help in violation of Commission rules will create great uncertainty both at the federal and state level, and will inevitably deter the deployment of IP voice applications. These applications hold out the promise of great consumer benefit, allowing the delivery of voice and data in efficient and innovative ways. If the ILEC practices are allowed to continue unabated, they will have the precise deleterious effect the Commission sought to counteract by adopting its current policy.

2. The FCC Should Promptly Resolve the Policy Questions Raised by AT&T's Petition.

AT&T's petition should lead the Commission promptly to resolve the important policy question of how to regulate Internet voice services, and more generally how intercarrier compensation should be treated for all service providers. AT&T is only one of many providers offering Internet voice services. Many providers such as Net-2-Phone are offering applications that provide so-called "computer-to-computer" or "computer-to-phone" IP voice services. At the same time, BellSouth has recently announced its phone-to-phone "DSL Talking Service," WorldCom sells its "WorldCom Connection," which offers an innovative mix of Internet-based applications, including both voice and data applications, and companies like Vonage offer mass-market Internet voice services. While AT&T is correct that at present Internet voice services are no threat to traditional POTS local and long-distance services, the idea that the question of the appropriate regulatory treatment of these services can be left for another day ignores the fact that that day has come.

We also share AT&T's view that the Commission ought to reaffirm and codify its previous conclusion that it would be unwise to subject *any* Internet application, including voice applications, to the burdens of the present carrier access charge regime. As the Commission itself has concluded, the carrier access charge regime is not cost-based, for its charges do not reflect the way in which costs are incurred, or the true amount of those costs. *See, e.g., Access Charge Reform Order*, ¶¶ 344-45. The disparate treatment of intra-state access, inter-state access, reciprocal compensation for local traffic, and the access provided CMRS carriers further adds to the irrationality of the present regime. For these reasons as well as others, the carrier

access charge regime does not send market participants the right economic signals, and it creates arbitrage opportunities that serve no rational public purpose. Despite Commission tinkering with some of the worst features of the carrier access charge regime, it remains an embarrassment and it ought to be eliminated. The Commission correctly understood that it would be a mistake to impose the burdens of this regime on the fledgling online world in 1988, and it would be just as much of a mistake to impose those burdens on the Internet today.

The more difficult question is what intercarrier compensation scheme should replace the existing hodgepodge of intercarrier compensation regimes. The Commission's Intercarrier Compensation NPRM poses the right questions as it seeks to establish a framework that would apply the same intercarrier compensation principles to all forms of traffic exchange. Those rules should be formulated to allow competition to develop between and among IP voice services and POTS services in a manner that is unbiased by inefficient rules that disparately affect the different types of service. Indeed, the rules need to respond to the fact that categories like "local" and "long-distance," or "voice" and "data," are regulatory artifacts, and rules that draw artificial distinctions will only perpetrate regulatory distortions that the Commission should be seeking to eliminate.

Finally, questions about the appropriate regulatory treatment of Internet voice applications, and about a rational intercarrier compensation scheme, highlight a point that WorldCom and others have made repeatedly in the *Broadband Framework* proceeding. By focusing regulatory attention on the *services* providers offer, rather than on whether there are facilities that need to be regulated because of their bottleneck characteristics, the Commission's tentative conclusions in that proceeding, if adopted, would not provide a rational foundation for

regulation of broadband or any other services, but would rather exacerbate a problem that has led to much of the agency's difficulties in this area. The Commission should embrace the same principle that has provided substantial consumer benefits to date: commonsense regulation of bottleneck transmission facilities leads to robust competition among otherwise lightly regulated, or unregulated, applications that use those facilities.

A provider that offers consumers the service of carrying their traffic across the country (or across the world) needs to use the ILEC's local loops to originate and terminate that call whether the traffic is voice traffic, data traffic, or traffic over the world wide web; whether it is packetized using Internet protocol or channelized using a traditional voice protocol; or whether the IP conversion occurs in the network (as in phone-to-phone IP voice applications), or in the user's computer (as in computer-to-computer IP voice applications). Questions about whether the ILEC should be required to make its facilities available to originate and terminate that call, who should pay for that use, and how much should be paid, ought not to vary solely because of legacy regulatory distinctions, the nature of the transmission protocol, or other irrelevant characteristics of the communication.

Artificial rules at best encourage arbitrage and create regulatory conundrums when a variety of "services" that may be regulated differently when provided separately are provided as one service – exactly the conundrum presented by the use of the Internet to provide both voice and data services at the same time. At worst, such rules threaten to give owners of bottleneck transmission facilities the right to exclude all users from these facilities when the Commission declares that a particular service is "deregulated," permitting the ILECs to extend their monopoly onto downstream markets that were once competitive, and greatly harming consumer welfare.

While the Commission has at times been sensitive to these problems, *see, e.g., Intercarrier Compensation NPRM*, in the *Broadband Framework* proceeding, at the behest of the ILECs, the Commission has tentatively adopted conclusions that would set in stone as regulatory "definitions" rules that irrationally discriminate among services. If adopted, these policies would require regulated access when carriers need the ILEC lines for traditional voice services carried over voice protocols, but permit the ILECs to deny access over those same lines when needed to originate or terminate calls using Internet protocol or carrying data. The Commission's "definitions" would have this irrational effect without regard to whether there was any real need for the access when provided in the first instance, or when withheld in the later instance. Similar fallacious arguments have surfaced in the *Triennial Review* proceeding, where the ILECs are arguing that access to facilities should depend on the services the competitors seek to offer over the facilities, rather than on whether the facilities are themselves bottlenecks – without which competitors would be impaired in their ability to offer *any* services. But a rule that maintained, for example, that competitors can lease an ILEC loop if they seek to provide channelized voice services over the loop, but may not lease the same loop when they seek to provide packetized voice services over the loop, suffers from the same defects as a rule that says that intercarrier compensation for use of the loop should turn on such irrelevant characteristics. In all of their iterations, rules based on irrelevant service or technical characteristics further no rational policy goal, and to the contrary can cause great harm to consumers.

The least of the problems with such regimes is that they make it virtually impossible rationally to categorize Internet voice service – which potentially is a substitute for POTS service, and yet at the same time is an unregulated Internet application which potentially offers

far more than POTS services. More troubling is that the regime would allow the ILECs to provide a full bundle of innovative voice and data applications over Internet protocol using their own bottleneck facilities, while competitors could use those same facilities to provide only POTS voice service. Over time, the inevitable result of such a regime would be the remonopolization of transmission services and all of the downstream services that rely on these transmission services. Consumers and the national economy would be far better off if the Commission refrained from imposing such a "framework."

In sum, the Commission ought to resolve these issues under the framework established in its Intercarrier Compensation NPRM, and it ought to distance itself from the tentative conclusions of its *Broadband Framework NPRM*. At the same time, it should issue the declaratory ruling sought by AT&T here to maintain the status quo and limit the harm caused by its irrational access charge regime until that regime can be replaced.

CONCLUSION

For these reasons, the Commission should grant AT&T's petition and enter a declaratory ruling that all VOIP services presently are exempt from access charges. The Commission also should proceed with its Intercarrier Compensation NPRM and establish a uniform intercarrier compensation regime that eliminates the inefficiencies that plague the existing regime.

Respectfully submitted,

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